

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Revision of the Commission's Rules to)	CC Docket No. 94-102
Ensure Compatibility with Enhanced 911)	
Emergency Calling System)	

To: Chief, Wireless Telecommunications Bureau

**PETITION FOR WAIVER
OF SECTIONS 20.18(e) AND 20.18(g) OF THE COMMISSION'S RULES**

Duluth PCS, Inc. ("Duluth PCS"), pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. §1.3, hereby petitions for waiver of Part 20, subsections 20.18(e) and (g), to extend the October 1, 2001 implementation deadline for Phase II E911 services. In support thereof, the following is respectfully shown:

I.

BACKGROUND

Duluth PCS is a new, small independent carrier^{1/} licensed to provide Broadband Personal Communications Service ("PCS") in small market areas located primarily in the nation's heartland. Specifically, Duluth PCS holds the C Block PCS license KNLF342 for BTA market #119 serving Duluth, Minnesota, and the partitioned D Block PCS license WPSP791 for BTA market #298 serving portions of Pine County outside of Minneapolis, Minnesota.^{2/} Duluth PCS timely completed construction of its licensed systems with initial operations limited to data

^{1/} Duluth PCS is classified as a "Tier III" non-nationwide carrier in accordance with the Commission's July 26, 2002, *Stay Order*. See *infra* notes 6, 17.

^{2/} WPSP791 is a partitioned portion of a Minneapolis, Minnesota, license that covers portions of Pine County in Minneapolis, Minnesota.

services, or high-speed Internet access service. As Duluth PCS prepares to implement the next stage of its business plan, however, its service will incorporate real-time, two way switched voice service that is interconnected with the public switched network, thereby triggering the FCC's E911 requirements.

Upon initiation of services subject to the FCC's E911 rules, Duluth PCS will be fully compliant with all E911 Phase I requirements. Duluth PCS has purchased, installed, and tested the proper network equipment and will be routing all emergency 911 calls to the appropriate 911 dispatcher, and will include call, cell site and sector information. As explained in more detail below, however, Duluth PCS will be unable to implement the FCC's Phase II E911 requirements because the handsets necessary to implement the technology contemplated by Phase II E911 requirements are not yet generally available.

The E911 requirements of Section 20.18 of the Commission's Rules, 47 C.F.R. § 20.18, apply to service providers in the affected services (including PCS), "*solely to the extent that they offer* real-time, two way switched voice service that is interconnected with the public switched network and utilize an in-network switching facility which enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls" (emphasis added). In anticipation of offering services covered by the FCC's E911 rules in the near future, therefore, Duluth PCS here submits this request for waiver of the FCC's Phase II requirements.^{3/}

^{3/} The capabilities of the constructed system were limited to fixed communication services and high-speed Internet broadband services. The services were not interconnected to the public switched network. For this reason, to date, Duluth PCS has not been subject to the Commission's reporting requirements on E-911.

II.

DISCUSSION

A. Status Of Phase II E911 Service And Need For Waiver.

Section 20.18 of the Commission's rules, 47 C.F.R. § 20.18, requires PCS licensees that are subject to the E911 requirements to begin selling and activating handsets capable of providing automatic location identification ("ALI") by no later than October 1, 2001, irrespective of whether a Public Safety Answering Point ("PSAP") has requested deployment of Phase II 911 enhanced service. Section 20.18 also requires that such licensees ensure that at least 25 percent of all new handsets activated are location-capable no later than December 31, 2001, that at least 50 percent of all new handsets activated are location-capable no later than June 30, 2002, and that 100 percent of all new digital handsets activated are location-capable no later than December 31, 2002 and thereafter.

In adopting the October 1, 2001 deadline, the Commission acknowledged the fact that the industry development of the handset technology necessary to enable widespread distribution of ALI-capable handsets had not yet fully developed.^{4/} As the October 1, 2001 deadline approached, carriers subject to the Commission's E911 requirements encountered significant delays in handset manufacturers' production of ALI capable handsets. Recognizing these industry obstacles, on October 19, 2001, the Commission announced that small and mid-sized wireless carriers subject to the E911 service rules should file requests for relief of the E911

^{4/} Indeed, the Commission adjusted its initial March 2001 deadline on reconsideration of Section 20.18 (g) to reflect this industry reality.

requirements as of November 30, 2001.^{5/} Many existing small and mid-sized carriers accordingly submitted waiver requests by this date.

On July 26, 2002, in response to the overwhelming evidence of the continued unavailability of ALI-capable handsets presented in the waiver requests, the Commission announced a stay of the application of certain E911 Phase II deadlines to those small and medium-sized non-nationwide Commercial Mobile Radio Service (“CMRS”) providers who had timely filed waiver requests.^{6/} The Commission also stated that it would grant relief to *all* small and medium-sized carriers filing waiver requests, even where such waiver requests were not filed by the specified November 30, 2001 deadline.⁷

Like most of the small and medium- sized carriers, Duluth PCS plans to use handset-based technology rather than network-based technology to provide ALI according to the Commission’s E911 service rules. To that end, Duluth PCS has pursued agreements with multiple handset manufacturers to offer ALI-capable handsets to their customers, and is currently in negotiations with Nokia, Motorola, and Kyocera for the delivery of ALI-capable handsets at the earliest possible time. Each of these manufacturers has informed Duluth PCS, however, that despite their best efforts, they will be unable to provide ALI-capable handsets until the end of the third quarter of 2002 at the earliest. This situation exists in the industry generally, at least for

^{5/} See Wireless Telecommunications Bureau Provides Guidance on Filings by Small and Mid-Sized Carriers Seeking Relief From Wireless E911 Phase II Automatic Location Identification Rules, Public Notice, DA 01-2459 (October 19, 2001).

^{6/} See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, *Order to Stay*, FCC 02-210 (Rel. July 26, 2002) (“*Stay Order*”). The Commission also stated that it would grant relief to all carriers filing a waiver request, including late-filed waivers.

⁷ As noted earlier, Duluth PCS was not required to file a request as of the November 30, 2001 deadline since the service it provided at the time was not subject to the FCC’s E911 rules. This waiver request, therefore, while filed after November 30, should not be deemed “late filed,” as that term is commonly understood.

small carriers, such as Duluth PCS. As reflected in the numerous waiver requests already filed, sufficient E911-compliant ALI-capable handsets are not overwhelmingly available on an industry-wide basis. Indeed, it is most likely that small carriers, such as Duluth PCS, will be able to obtain, sell and activate handsets with ALI capability only after such manufacturers have served the needs of the major carriers (who also have also filed waiver requests), as such larger carriers are pressing manufacturers to bring these handsets to market as quickly as possible, and have considerably more negotiating leverage than Duluth PCS.

In sum, Duluth PCS has no alternative but to request waiver of Section 20.18(g)(1) applicable to carriers choosing a handset-based E911 solution, and to propose a delayed schedule for selling and activating location-capable handsets.

B. Duluth PCS Has Met The FCC's Rule Waiver Standard, And Grant Of The Requested Waiver Would Serve The Public Interest.

Under the standard established in *WAIT Radio*,^{8/} waiver of an FCC rule is appropriate where it will serve the public interest and not undermine the purpose of the rule. The *WAIT Radio* standard has been codified in Section 1.925 of the Commission's Rules which states that an entity requesting a waiver must demonstrate either that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. In

^{8/} *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

adopting the *Second Report and Order*^{9/}, the Commission expressly recognized that there would be instances where the burden of providing E911 service would be significant.^{10/} The Commission pointed to this relief mechanism in defending its E911 scheme before the U.S. Court of Appeals, representing that waivers would be available to alleviate the burden of E911 service for carriers who will be abnormally burdened financially.^{11/}

The Commission also has recognized that rural carriers “may face distinct challenges in implementing Phase II...”^{12/} Considering the problems that may arise, the Commission established a waiver mechanism. Thus, the *Fourth Memorandum Opinion and Order* requires that E911 waivers be “specific, focused and limited in scope, with a clear path to compliance.”^{13/} Further, the Commission has stated its expectation that carriers with no solution employ a solution that best approximates the Phase II requirements as soon as possible.^{14/} Duluth PCS’s waiver request satisfies each of these standards and should be granted.

Granting a waiver that recognizes that it is impossible for Duluth PCS to initiate Phase II service at this time would not frustrate the underlying purpose of the rule. First, as shown in this petition, and in the numerous requests of other carriers for waiver of the Phase II E911

^{9/} See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Second Report and Order*, CC Docket No. 94-102 (Rel. June 9, 1999) (“*Second Report and Order*”).

^{10/} See *id.* at 17457-8.

^{11/} *U.S. Cellular v. FCC*, Case No. 00-1072 (D.C. Cir.), FCC Brief at 429.

^{12/} See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Fifth Memorandum Opinion and Order*, CC Docket No. 94-102, ¶ 21 (Rel. Nov. 22, 2000) (“*Fifth MO&O*”).

^{13/} See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Fourth Memorandum Opinion and Order*, CC Docket No. 94-102, ¶ 44 (Rel. Sept. 8, 2000) (“*Fourth MO&O*”).

^{14/} *Second Report and Order*, at 17458.

implementation schedule, adequate ALI-capable handsets are not yet overwhelmingly available. Second, ALI-capable handsets will become available to smaller carriers, such as Duluth PCS, only some period of time after larger carriers with sufficient negotiating power are able to persuade manufacturers to expedite production and bring reasonably priced and effective products to market. Third, Duluth PCS, as a new Broadband PCS service provider was not operating a system subject to the E911 service rules at the time the ALI-capable deadlines were implemented, and consequently was not required to comply with the October 2001 deadline at that time.

In any event, no local PSAPs have requested Phase II service from Duluth PCS and, insofar as Duluth PCS can determine, no local PSAP is yet equipped to receive E911 data. In addition, commencement of sales of ALI-capable handsets on October 1, 2001 as required by rule section 20.18(g) was impossible, since Duluth PCS did not offer real-time, two way switched voice service interconnected with the public switched network at that time. All of these circumstances demonstrate that the purpose of the Commission's E911 rules will not be frustrated by a grant of the requested waiver, and that because of the "unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, [and that Duluth PCS] has no reasonable alternative."

In the July 26, 2002, *Stay Order*,^{15/} the Commission stayed the application of certain specific E911 Phase II deadlines to Tier II^{16/} and Tier III^{17/} non-nationwide CMRS providers who

^{15/} See *Stay Order*, *supra* note 6.

^{16/} See *id.* ¶ 22. The Commission defined Tier II carriers as "CMRS carriers that had over 500,000 subscribers as of the end of 2001."

have filed waiver requests. Duluth PCS meets the Commission's classification of a Tier III CMRS provider. In the *Stay Order*, the Commission acknowledged that it is more burdensome for non-nationwide CMRS carriers to obtain commitments from manufacturers, necessary to deploy E911 immediately. In addition, the Commission stated that there is "good cause" to grant a temporary stay of the Phase II deadline for small CMRS carriers, and that a temporary stay is in the public interest because it encourages a "more efficient rollout of E911."^{18/}

In keeping with the Commission's direction that E911 waiver requests be "specific, focused and limited in scope, with a clear path to compliance," Duluth PCS does not request an indefinite extension of the current deadline. Duluth PCS recognizes that the E911 rules are designed to achieve important public safety objectives and wish to implement E911 capability to the extent possible, as quickly as possible. Therefore, rather than requesting a "broad, generalized waiver," Duluth PCS has projected a proposed schedule consistent with current market conditions, expected product availability and reasonable best efforts.

In particular, Duluth PCS requests a waiver, consistent with the requirements set forth in the *Stay Order*, to allow it to begin selling and activating ALI-capable handsets by the first quarter of 2003. Correspondingly, the date for Duluth PCS to begin selling and activating ALI-capable handsets would be no later than September 1, 2003; the 25% benchmark would be extended to November 30, 2003; the date for the 50% benchmark would be extended to May 31, 2004; the date for the 100% benchmark would be extended to the November 30, 2004; and, per

^{17/} See *id.* ¶ 24, Appendix B. The Commission defined Tier III carriers as those meeting the classification under the small business size standard subject to Small Business Association ("SBA") approval.

^{18/} See *id.* ¶ 16.

the *Stay Order*, the 95% benchmark for ALI handset penetration would remain December 21, 2005.^{19/}

This schedule for implementation is more realistic, given that there are no alternative handset solutions available to Duluth PCS at this time. An assumption of this proposed schedule is that, as time progresses, better and more cost-effective handset solutions should be made available. Further, the cost to public safety resulting from this proposed schedule should be minimal.

III.

CONCLUSION

For the reasons above, Duluth PCS respectfully requests that the Commission grant its request for waiver of Part 20, subsections 20.18(e) and (g) in accordance with the foregoing.

Respectfully submitted,

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^{19/} See *id.* ¶ 33. While the Commission cautioned that “only carriers who have filed requests for relief are covered under the stay,” it also stated that, on its own motion, it chooses to grant relief “to all carriers filing a waiver request, including last-filed waivers.” *Id.* at n.21.